Supreme Court, U.S.
FILED
JUN 15 2001
OFFICE

No. 99-1996

IN THE

Supreme Court of the United States

J.E.M. AG SUPPLY, INC. (doing business as Farm Advantage, Inc.), FARM ADVANTAGE, INC., LARRY BENZ, MERLE PRUETT, (doing business as Siouxland Seeds, Inc.), KEVIN WOLFSWINKEL, TIM KAMSTRA, and TOM EISCHEN SEED & CHEMICALS,
Petitioners,

v.

PIONEER HI-BRED INTERNATIONAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Federal Circuit

BRIEF FOR WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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June 15, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether sexually reproduced seeds are patentable subject matter under 35 U. S. C. §101.

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INTEREST OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appears in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving property rights. *See, e.g.*, *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). It has also published numerous articles on intellectual property. *See, e.g.*, Michael Bettinger & Peter Berger, *Can Intellectual Property Be Protected On the Internet?*, WLF Legal Backgrounder (Apr. 14, 2000); Reid G. Adler & Kate H. Murashige, *Biomedical Product Patent Protection Essential to High-Tech Economy*, WLF Legal Backgrounder (Feb. 2, 1996).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions.

WLF submits this brief in support of Respondent and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the opinions of the U.S. District Court and the U.S. Court

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

of Appeals for the Federal Circuit in their decisions below. In addition, we wish to emphasize certain aspects of the record.

1. The question presented implicates three federal statutes: 35 U. S. C. §101; the Plant Patent Act of 1930 (PPA), Ch. 312, 46 Stat. 376, 35 U. S. C. §§161–64; and the Plant Variety Protection Act of 1970 (PVPA), 84 Stat. 1547, 7 U. S. C. §2321, *et seq.*

Section 101 of Title 35 provides:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent thereof, subject to the conditions and requirements of this title.

35 U. S. C. §101. The Board of Appeals and Interferences of the Patent and Trademark Office (PTO) has interpreted §101 to mean that sexually reproduced plants—these are produced by seeds rather than by a single parent, using a method such as grafting—are patentable subject matter. *Ex parte Hibberd*, 227 U.S.P.Q. (BNA) 443, 443–47 (Bd. Pat. App. & Interf. 1985). Since handing down *Hibberd* the PTO has issued hundreds of "utility patents" for sexually reproduced plants.

The PPA grants the PTO authority to issue patents covering new and distinct varieties of asexually reproduced plants. The relevant section of the PPA provides:

> Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an unculti-

> vated state, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U. S. C. §161. The same section further provides that, except as otherwise noted, "[t]he provisions of [Title 35] relating to patents for inventions shall apply to patents for plants." *Id.* The PTO has granted more than 10,000 patents covering asexually reproduced plants under §161.

The last of the three statutes at issue here, the PVPA, specifically establishes intellectual property protection for novel varieties of sexually reproduced plants that meet statutory criteria of distinctness, uniformity, and stability. *See* 7 U. S. C. §2402(a). With the enactment of the PVPA Congress established a statutory regime, apart from the patent regime found in Title 35, under which the Department of Agriculture may issue plant variety certificates to applicants who breed novel varieties of sexually reproduced plants. *See id.* at §2483.

2. Respondent Pioneer Hi-Bred International, Inc. (Pioneer) is "the world's largest seed corn producer." Pet. App. 14. Petitioner J.E.M. AG Supply, doing business as Farm Advantage, Inc., is "a family-owned full service agricultural supply business." *Id.* Other petitioners act as distributors for Farm Advantage. *Id.*

This case arose when Pioneer brought suit against Petitioners (collectively referred to hereafter as Farm Advantage) for allegedly infringing 17 patents held by Pioneer for "sexually reproducing corn plants." *Id.* Farm Advantage moved for summary judgment, asserting in defense that sexually reproducing plants like the varieties of genetically engineered corn covered by the patents at issue are not patentable subject matter under 35 U. S. C. §101. *Id.* at 16.

The U.S. District Court for the Northern District of Iowa denied Farm Advantage's motion for summary judgment and held that sexually reproduced plants are patentable subject matter under §101. *Id.* at 39. After analyzing the text of §101, the court determined that both well-established interpretive practice and congressional intent supported a broad reading of the provision. The court found that "the words of §101 have been liberally construed to include the most diverse range of imaginable and unforeseen developments in technology." *Id.* at 21. In addition, the court found that §101's broad language reflected the constitutional and statutory aims underlying the patent system. "The subject matter provisions [of Title 35] have been cast in broad terms to fulfill the constitutional and statutory goal of promoting 'the Progress of Science and the useful Arts' with all the means for the social and economic benefits envisioned by the Framers." *Id.* at 22 (quoting U.S. Const. art. I, §8, cl. 8). Relying also on *Diamond* v. *Chakrabarty*, 447 U.S. 303 (1980), the court concluded that "the scope of §101 includes man-made life forms, including plant life." *Id.* at 22.

The district court rejected Farm Advantage's argument that Congress had intended to exclude sexually reproduced seeds from the scope of 35 U. S. C. §101 by enacting the PPA and PVPA. A careful reading of the three statutory provisions led the court to conclude that "neither the PPA or the PVPA expressly includes any plant subject matter from protection under 35 U. S. C. §101 of the General Patent law." *Id.* at 24.

Legislative history proved to be no more availing to Farm Advantage. The court did find certain passages in the legislative history of the PVPA that could be understood to mean that "the drafters believed that there was no protection for plants which reproduce sexually,

that is, by seeds." *Id.* at 28. But the court explained that this belief was reasonable at the time and that it had no bearing on the scope of §101. When Congress enacted the PVPA plants were regarded as unsuitable for patenting because they were "products of nature." *Id.* at 29. It was also thought at the time that "plants were not amenable to the 'written description' requirement of the patent law." *Id.* *Chakrabarty* removed the first limit by holding that living organisms are patentable subject matter under §101. *See* 447 U.S. at 305, 309–10. Congress eliminated the other perceived restriction by relaxing the written description requirement.[2] Thus, the court determined that the enactment of PPA and PVPA did not remove sexually reproduced plants fall from the scope of §101. Instead these statutes were passed to address limitations in the patent system that subsequent legal developments have eliminated.

The district court further rejected Farm Advantage's argument that the enactment of the PVPA implicitly narrowed the scope of §101, allegedly because of "an irreconcilable conflict," *id.* at 30, between them. Citing the "cardinal principle of construction that repeals by implication are not favored," *id.* at 31 (quoting *United States* v. *Borden Co.*, 308 U.S. 189, 198–99 (1939)), the court found that the conflicts asserted by Farm Advantage "fall far short of what could be required to find an irreconcilable conflict or positive repugnancy that would mandate a partial repeal of § 101 by implication." *Id.* at 31.

The court found two reasons especially persuasive. Because "the scope of §101 is much broader than the

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[2] "Today, the requirements of [35 U. S. C.] §112 can be met through a written description combined with a deposit of the invention as required for some microorganisms." Pet. App. 29 (citing Manual of Patent Examining Procedure § 2403.02 (6th ed. 1997)).

scope of protection under the PVPA . . . [T]here are good reasons . . . why any applicant may choose §101 over the PVPA." *Id.* at 32. In addition, the court pointed to "the important differences between the legal standards that must be satisfied to receive a utility patent and the standard that must be satisfied to obtain a certificate under the PVPA." *Id.* The court then inferred that the differences between §101 and the PVPA reflected the greater degree of legal protection, and with it the correspondingly higher eligibility requirements, of §101. *Id.* at 32–33. Absent a genuine conflict, the court concluded that Congress had not intended with the enactment of the PVPA to implicitly exclude sexually reproduced plants from coverage under §101. *Id.* at 38–39.

The U.S. Court of Appeals for the Federal Circuit unanimously affirmed. *Id.* at 9. In a comparatively short opinion that closely followed the district court's reasoning, the Court of Appeals agreed with Pioneer that "the asserted conflict [between 35 U. S. C. §101 and the PPA and PVPA] is simply the difference in the rights and obligations imposed by the two statutes." *Id.* The court also rejected Farm Advantage's argument that this Court's decision in *Chakrabarty* "does not apply to plants because plants were intended to be excluded from the patent system, as evidenced by the enactment of other statutes to provide protection to plants." *Id.* at 4. Accordingly, the Federal Circuit held that sexually reproduced seeds are patentable subject matter under 35 U. S. C. §101. *Id.* Farm Advantage then petitioned for certiorari, which was granted. 121 S. Ct. 1077.

SUMMARY OF ARGUMENT

Farm Advantage's *amici* attempt to undermine the plain language of §101. They argue that the Intellectual Property Clause, U.S. Const. art. I, §8, cl. 8, authorizes

Congress to issue patents only when it serves the purpose of "promot[ing] the Progress of Science and the useful Arts . . . ." *Id.* The *amici* infer that "[u]ntil Congress makes this determination, utility patents on sexually reproduced plants are unconstitutional." Brief for Malla Pollack and Other Law Professors as *Amici Curiae* 3. They further argue that the Court should construe §101 narrowly, awaiting Congress's express determination that a novel or disputed subject matter is patentable.

With these arguments the *amici* "strain at a gnat, and swallow a camel." *Matthew* 23:24 (King James). They urge the Court to read §101 so parsimoniously that any dispute concerning the status of a novel subject matter would have to await resolution by Congress. At the same time, they saddle Congress with the task of explicitly determining the patentability of "anything under the sun that is made by man," *Diamond* v. *Chakrabarty*, 447 U.S. 303, 309 n.6 (1980). And they would void every existing patent, apparently regardless of the financial consequences, unless issued on the strength of such a determination. These results would be so disruptive that they instantly call into doubt the legal reasoning on which they rely. But even more fatal errors lie in the constitutional interpretation on which the arguments depend.

The text and original understanding of the Intellectual Property Clause teach that the Clause contains no mandatory purpose that limits the power of Congress to issue patents. Even if the Constitution contained such a limitation, §101 is not the proper statutory mechanism for ensuring a reasonable fit between the limits on congressional power and the issuance of patents. And the suggestion that §101 does not cover a novel or disputed subject matter until expressly authorized by

Congress is foreclosed by this Court's decision in *Diamond* v. *Chakrabarty*, 447 U.S. 303 (1980).

In addition to these constitutional and statutory arguments, Farm Advantage's *amici* raise various policy arguments aimed at denying patent protection to sexually reproduced seeds. These arguments entail concerns about the patent system, anticompetitive conduct, the plight of farmers, and genetic diversity. None is persuasive because each is irrelevant.

ARGUMENT

The question presented requires the Court to construe 35 U. S. C. § 101, which provides:

> Whoever invents or discovers *any* new and useful process, machine, manufacture, or composition of matter, or *any* new and useful improvement thereof, may obtain a patent thereof, subject to the conditions and requirements of this title.

35 U. S. C. §101 (emphasis added). This Court has recognized that "[i]n choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive 'any,' Congress plainly contemplated the patent laws would be given wide scope." *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980). Indeed, the Court has emphasized that "in dealing with the patent laws, we have more than once cautioned that 'courts 'should not read into the patent laws limitations and conditions which the legislature has not expressed.'"" *Diamond* v. *Diehr*, 450 U.S. 175, 182 (1981) (quoting *Chakrabarty*, 447 U.S. at 308) (quoting *United States* v. *Dubilier Condenser Corp.*, 289 U.S. 178, 199 (1933)). For these reasons, a straightforward reading of §101 ought to resolve this case against Farm Advantage.

However, Farm Advantage attempts to undermine the evident breadth of §101, arguing that Congress impliedly eliminated sexually reproduced plants as patentable subject matter by enacting the PVPA, a statute specifically targeted at protecting the intellectual property of plant developers.[3] *See* Br. Pet. 25–26, 37, 49. Farm Advantage's *amici* also strive to blunt the force of §101. Unable to deny the plain meaning of §101, they insist that this case is "not simply one of statutory construction." Brief for Malla Pollack and Other Law Professors as *Amici Curiae* 9. Instead, they argue that "utility patents on sexually reproduced plants are unconstitutional." *Id.* at 3.

The *amici* defend this remarkable contention based on three claims. First, they assert that "promoting progress is the required goal of the rights Congress has power to issue under the Intellectual Property Clause."

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[3] This argument fails for reasons explained by the Federal Circuit and the district court. *See* Pet. App. 8–9. 30–33. Passage of the PVPA operated as an implied repeal of §101 as to sexually reproduced plants only if there is a "'positive repugnancy,'" *United States* v. *Borden Co.*, 308 U.S. 189, 199 (1939) (quoting *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842)), between the statutory provisions. But no conflict exists. Given the lower threshold of eligibility required under the PVPA, *compare* 35 U. S. C. §112 *with* 7 U. S. C. §2422, it is entirely reasonable for a plant breeder to seek protection under the PVPA without also seeking a utility patent. Conversely, possessing a utility patent does not automatically qualify one for protection under the PVPA. *See* 7 U. S. C. §2402(a)(3)–(4). The Federal Circuit was right to say that any disparities merely reflect "the difference in the rights and obligations imposed by the two statutes." Pet. App. 9. Absent a conflict between §101 and the PVPA, the chief prop of Farm Advantage's case collapses. For §101 on its face contains no language excluding sexually reproduced plants from patent protection. And as for the argument that the presence of overlapping protection somehow violates the law, the Court has already resolved that point. "Certainly the patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention." *Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 484 (1974).

Id. at 6. Second, they say that "[t]he purpose limitation in the Clause would be unnecessary if all conceivable 'exclusive rights' granted for 'limited times' to 'inventors' in their 'discoveries' would necessarily 'promote the progress of . . . the useful arts.'" *Id.* at 7. Third, they maintain that these constitutional limitations obligate Congress to "consider whether that specific scheme is likely to promote progress." *Id.* at 9.

I. THE INTELLECTUAL PROPERTY CLAUSE CONTAINS NO MANDATORY PURPOSE THAT LIMITS THE POWER OF CONGRESS TO ISSUE PATENTS.

Whether the Intellectual Property Clause contains a particular limit on congressional power "must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838). These textual and historical inquiries are independent. We begin by considering the constitutional text and then turn our attention to "evidence of the original understanding of the Constitution." *Alden* v. *Maine*, 527 U.S. 706, 741 (1999).

The Intellectual Property Clause delegates to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, §8, cl. 8. These words should be neither stretched nor contracted, contrary to their natural meaning. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

From a purely textual perspective this Clause stands apart. Other clauses of article I, §8 delegate a certain power to Congress, such as the power "[t]o borrow Money on the credit of the United States," *id.* at art. I, §8, cl. 2, or "[t]o establish Post Offices and post Roads." *Id.* at art. I, §8, cl. 7. But they are silent on the question of what means Congress employs to exercise that power. Indeed, the Necessary and Proper Clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." *Id.* at art. I, §8, cl. 18. The Intellectual Property Clause departs from this pattern. "It is unique in being the only instance wherein the delegates [at the Philadelphia Convention] prescribed a specific mode of accomplishing the particular authority granted." Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 33 (1994).

The words of the Intellectual Property Clause thus belie the claim that a substantive limitation on congressional power lies with the grant of power "[t]o promote the Progress of Science and the useful Arts," U.S. Const. art. I, §8, cl. 8. This interpretation, in effect, rewrites the clause, giving Congress the power "to secure for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries, for the purpose of promoting the progress of science and the useful arts." But reversing the syntax changes the meaning and confuses a constitutionally defined means of carrying out a delegated power with a constitutionally prescribed purpose. Read as it appears, the chief limitation on congressional power under the Intellectual

Property Clause lies with the unique specification of the exclusive constitutional means of exercising the power "[t]o promote the Progress of Science and the useful Arts." *Id.* Congress may use this power *only* "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

Available "evidence of the original understanding of the Constitution" *Alden* v. *Maine*, 527 U.S. 706, 741 (1999)," lends this textual analysis further support. The Intellectual Property Clause entered the list of enumerated powers late in the proceedings of the Philadelphia Convention. On August 18, 1787, James Madison recommended several additions to the list of congressional powers, for referral to the Committee of Detail. Among such powers was the power "'[t]o secure to literary authors their copyrights for a limited time.'" 2 The Records of the Federal Convention of 1787, at 325 (Max Farrand ed., 1966). Immediately afterward Charles Pinckney moved for the inclusion of similar congressional powers: "'To grant patents for useful inventions'" and "'To secure to Authors exclusive rights for a certain time.'" *Id.* Less than three weeks later, on September 5, 1787, the Convention voted without objection to grant Congress the power "'[t]o promote the progress of Science and useful arts by securing for limited times to authors & inventors, the exclusive right to their respective writings and discoveries.'" *Id.* at 509. In the report by the Committee of Style the language was lightly edited to read, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *Id.* at 595. Apart from the distinctive eighteenth century habit of capitalizing nouns, this language survived intact in the version found today at Article I, §8.

During the ratification period, the Intellectual Property Clause attracted little attention and no controversy at all. Indeed, our research has revealed not a single Antifederalist statement opposing the delegation of this power to the national government. The case in favor of granting Congress the power to protect authors and inventors is found in a well-known passage of *The Federalist*:

> The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases,[4] and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

The Federalist No. 43, at 288 (Jacob E. Cooke ed., 1961) (James Madison).

A newspaper article written by Justice Iredell sheds further light on how the Intellectual Property Clause was viewed by those who ratified it. Writing under the pseudonym "Marcus," Justice Iredell published a series of newspaper articles purporting to supply "*Answers* to

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[4] The historical record amply supports Madison's claim that the Articles of Confederation left States unable to protect intellectual property. "Numerous examples may be found in our early history of the difficulties which the creators of items of national import had in securing protection of their creations in all States." *Goldstein* v. *California*, 412 U.S. 546, 556 n.12 (1973). Prominent examples included Noah Webster's efforts to to obtain copyright protection for his book, "A Grammatical Institute of the English Language" and the struggles of John Fitch and others to get patent protection for their inventions regarding the steamboat. *Id.*

Mr. [George] Mason's *Objections* to the New Constitution, recommended by the late Convention at Philadelphia." 1 The Debate on the Constitution 363 (Bernard Bailyn ed., 1993). Mason had objected that "'the Congress may grant monopolies in trade and commerce.'" *Id.* at 384. In answer Justice Iredell pointed out that the federal government is prohibited from preferring "'the ports of one State over those of another,'" *id.* at 385 (quoting U.S. Const. art. I, §9), and that every citizen "'shall be entitled to all privileges and immunities of citizens in the several States.'" *Id.* (quoting U.S. Const. art. IV, §2). "These provisions," he wrote, "appear to me to be calculated for the very purpose Mr. Mason wishes to secure." *Id.* Justice Iredell then posed a rhetorical question, "Can they be consistent with any monopoly in trade and commerce?" *Id.*

Directly following this question he dropped a footnote:

> One of the powers given to Congress is, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." I am convinced Mr. Mason did not mean to refer to this clause. He is a gentleman of too much taste and knowledge himself to wish to have our government established upon such principles of barbarism as to be able to afford no encouragement to genius.

Id. at 385 n.*. Justice Iredell thus sharply distinguished between officially sanctioned monopolies, which he said the Constitution outlawed, and patents, which he labeled an "encouragement to genius." *Id.* Without these, he hinted that he would regard the federal government as having been established on "principles of barbarism." *Id.*

A prominent early scholar of the Constitution, St. George Tucker, viewed the Intellectual Property Clause from the same perspective as that suggested by our textual analysis. He stated that the Intellectual Property Clause "not only declares the object, but points out the express *mode* of giving the encouragement; viz. 'by securing for a limited time to authors and inventors, the exclusive right to their respective writings and discoveries.'" St. George Tucker, View of the Constitution of the United States With Selected Writings 208 (1999).

What little information can be gathered from the relevant contemporaneous materials strongly suggests, then, that the Founders originally understood the Intellectual Property Clause to protect important personal rights. Patent rights for inventors were thought of in terms not of a mediated conflict between public and private interests, but in terms of a species of legal protection where "[t]he public good *coincides* . . . with the claims of individuals." The Federalist No. 43, at 288 (Jacob E. Cooke ed., 1961) (James Madison) (emphasis added). Justice Iredell's statements suggest an even more vigorous defense of patent rights, one where they are considered a necessary "encouragement to genius," 1 The Debate on the Constitution, at 385 (1993), and where their absence indicates a government founded on "principles of barbarism." *Id.*

This understanding of patent rights stands in considerable tension with the historical outlook expressed in *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966). There the Court made statements suggesting that the Intellectual Property Clause must be interpreted narrowly, both to effectuate its stated purpose of "promot[ing] the Progress of Science and useful Arts," U.S. Const. art. I, §8, cl. 8, and to avoid allowing Congress to illegitimately grant monopolies. The Court in *Graham* began

its analysis by observing that "[t]he clause is both a grant of power and a limitation." 383 U.S. at 5. In place of an historical inquiry grounded on sources contemporaneous with the Founding, the Court made a sweeping claim regarding the Clause's pedigree. "It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public." *Id.* From this historical characterization, the Court inferred in the next sentence that "Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose." *Id.* at 5–6.

To be sure, the historical view on which *Graham* relied has some support. It is true that Blackstone, "the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999), reviewed the history of royal abuses and roundly condemned monopolies. *See* 4 William Blackstone, Commentaries *159. However, the Statute of Monopolies, 1623, 21 & 22 Jac. I c. 3, which largely reined in these abuses, contained an exception for "letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures . . . ." *Id.* This exception essentially created English patent law. F.W. Maitland, The Constitutional History of England 261 (H.A.L. Fisher ed., 1908). And, as the Court has recognized, "[m]uch American patent law derives from English patent law." *Sears, Roebuck & Co.* v. *Stiffel Company*, 376 U.S. 225, 230 n.6 (1964). Given this historical background, it is perhaps understandable that the Court in *Graham* would have emphasized the English prohibition on monopolies

as a countervailing force against which to interpret the scope of the Intellectual Property Clause.

Yet *Graham* has come under fire for its historical analysis by scholars intimately familiar with the Founding Era. In an article comprehensively reviewing the interpretive history of the Intellectual Property Clause, the author found *Graham* to be "unprecedented." Kenneth J. Burchfiel, *Revising the "Original" Patent Clause: Pseudohistory in Constitutional Construction*, 2 Harv. J. Law & Tech. 155, 181 (1989). Before *Graham*, Burchfiel writes, "the Supreme Court had recognized only three constitutional limitations." *Id.* at 181 n.153. These included the express condition that patents be granted only "for limited Times," U.S. Const. art. I, §8, cl. 8, the implied condition that patent rights are subject to reasonable state regulations, *see* 2 Harv. J. Law & Tech. at 181 n.153, and "the limitation of patent rights to domestic application." *Id.*

Based on his research, Burchfiel concluded that the "constitutional purpose," 383 U.S. at 5–6, limitation identified in *Graham* lacks historical support.[5]

> History provides no support for the conclusion that antimonopolist sentiment influenced the original interpretation of the intellectual property clause, or that considerations of public policy were regarded as imposing limitation in the grant of the patent power. To the contrary, the intellectual property clause's statement of purpose was often cited by early courts as

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[5] In a similar vein, another scholar has criticized *Graham* for unjustifiably elevating Thomas Jefferson's views above those of other Founders and for relying on Jefferson to justify its skeptical perspective toward patents. Edward C. Walterscheid, *The Use and Abuse of History: The Supreme Court's Interpretation of Thomas Jefferson's Influence on the Patent Law*, 39 J.L. & Tech. 195 (1999).

> evidence of constitutional solicitude for the quasi-natural property rights of inventors in the fruits of their mental labors.

2 Harv. J. Law & Tech. at 180.

Burchfiel's argument appears to stand on firmer ground than *Graham*, which carelessly combined English law with the personal views of Thomas Jefferson. *See* 383 U.S. at 5–6, 7–10. As we have seen, James Madison, writing in *The Federalist*, unreservedly defended the patent power, The Federalist No. 43, at 288 (Jacob E. Cooke ed., 1961) (James Madison), and Justice Iredell evidently regarded patent protection as a "quasi-natural property right." *See* 1 The Debate on the Constitution 385 n.* (Bernard Bailyn ed., 1993). Neither they nor any other advocate of the Constitution publicly described the Intellectual Property Clause as a necessary evil, to be hedged around with implied limitations lest patents become monopolies.

Both textual and historical inquiries tend to refute their claim that Congress may constitutionally exercise its patent power only if granting patent rights as to a particular subject matter serves the purpose of "promoting progress." Brief for Malla Pollack and Other Law Professors as *Amici Curiae* 6. In fact, the effort to unnaturally confine the words of the Intellectual Property Clause calls to mind the stern warning of Chief Justice Marshall:

> Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course

> of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.

Gibbons v. *Ogden*, 22 U.S. (9 Wheat. 1) 1, 222 (1824).

II. SECTION 101 IS NOT THE PROPER STATUTORY MECHANISM FOR ENSURING A REASONABLE FIT BETWEEN PURPORTED LIMITS ON CONGRESSIONAL POWER AND THE ISSUANCE OF PATENTS.

Farm Advantage's *amici* also argue that "[t]he purpose limitation in the Clause would be unnecessary if all conceivable 'exclusive rights' granted for 'limited times' to 'inventors' in their 'discoveries' would necessarily 'promote the progress of . . . the useful arts.'" Brief for Malla Pollack and Other Law Professors as *Amici Curiae* 7. This concern is misplaced.

The *amici* seem to misconceive the nature of §101. The sole question before the Court is whether sexually reproduced seeds are "eligible for patent protection." *Parker* v. *Flook*, 437 U.S. 584, 588 (1978). "Excluded from such patent protection are laws of nature, natural phenomena, and abstract ideas." *Diamond* v. *Diehr*, 450 U.S. 175, 185 (1981) (citations omitted). At the same time, "it is equally clear that a process is not unpatentable simply because it contains a law of nature or a mathematical algorithm." 437 U.S. at 590. For example, Watson and Crick's discovery of the structure of DNA, James D. Watson, The Double Helix 120 (Gunther S. Stent ed., 1980), falls outside the definition of patentable subject matter under § 101, while an invention employing that structure might not.

Even if (contrary to the analysis above) the Intellectual Property Clause were thought to limit Congress's power to the boundaries of a prescribed purpose, denying a large and important field like the development of genetically modified seed from coverage under §101 is wholly unnecessary to ensure a reasonable fit between the limitations on congressional power and the actual issuance of patents. Resolving a §101 question does not decide whether a particular invention, even one in the category of sexually reproduced seeds, ought to receive a patent. It only opens the door for an inventor to obtain a patent, subject to the conditions of novelty, 35 U. S. C. §102, and nonobviousness, *id.* at §103, required by statute. If the Constitution were thought to require a close connection between the standard for issuing patents and the language of the Intellectual Property Clause, surely the finer-grained inquiries under sections 102 and 103 better suit that purpose.

A similar form of confusion fails to differentiate between the §101 inquiry into statutory subject matter and the §102 inquiry into novelty. Another group of *amici* make this mistake when they argue that sexually reproduced plants fall outside the protection of §101 because, they say, "no potential utility plant patent holder has ever started from scratch." Br. Brief for American Corn Growers Association & National Farmers Union as *Amici Curiae* 26. They cite the example of Sharp Shooter lettuce, which is covered by a utility patent. *Id.* at 19. They point out that Seminis, the patent holder, relied on the then freely available information to develop Sharp Shooter lettuce. *Id.*

Well-settled principles caution against confusing the question of patentable subject matter with questions of novelty or nonobviousness. "The question therefore of whether a particular invention is novel is 'wholly apart

from whether the invention falls into a category of statutory subject matter.'" *Diehr*, 450 U.S. at 190 (quoting *In re Bergy*, 596 F.2d 952, 961 (Cust. & Pat. App. 1979) (emphasis deleted). In fact, the Court has succinctly described the relationship among sections 101, 102, and 103 in the following terms:

> In this case, it may later be determined that the respondents' process is not deserving of patent protection because it fails to satisfy the statutory conditions of novelty under §102 or nonobviousness under §103. A rejection on either of these grounds does not affect the determination that respondents' claims recited subject matter which was eligible for patent protection under §101.

Id. at 191. For these reasons, the argument that sexually reproduced plants fail to qualify for protection under §101 because seed patents somehow fail the tests of novelty or nonobviousness must be rejected.

III. THIS COURT'S PRECEDENTS CONSTRUING 35 U. S. C. §101 DO NOT REQUIRE CONGRESS TO EXPRESSLY CLASSIFY SEXUALLY REPRODUCED PLANTS AS PATENTABLE SUBJECT MATTER IN ORDER FOR THEM TO RECEIVE SUCH LEGAL PROTECTION.

Farm Advantage's *amici* make a further argument based on their contention that the Intellectual Property Clause permits Congress to authorize the issuing of patents only when doing so serves the purpose of "promot[ing] the Progress of Science and useful Arts." U.S. Const. art. I, §8, cl. 8. Given this constitutional limitation, they say, "[t]he broad wording of 35 U. S. C. §101, therefore, is not determinative." Brief for Malla Pollack and Other Law Professors as *Amici Curiae* 10.

In particular, they urge the Court to "void the patents at issue as constitutionally infirm—regardless of what standard statutory construction principles alone would suggest." *Id.* at 14. To justify this extreme remedy they reason that patents issued without an express determination by Congress that they serve the purpose of promoting progress are void because they lie beyond Congress's power to authorize.

> If Congress mistakenly enacts a statute whose words might be read to allow patent protection outside the scope of Congress' progress determination, these purported rights are void, because they are beyond Congress' power. The Court, therefore, should not mechanically enforce the broadest possible reading of statutory language. This Court should, instead, vindicate the legislative process by waiting for Congress in the first instance to determine how to promote progress.

Id. at 9–10.

The *amici* thus make two claims. They insist that Congress is *constitutionally* required to assess whether giving a particular subject matter patent protection serves the constitutional purpose of "promot[ing] the progress of Science and the useful Arts." U.S. Const. art. I, §8, cl. 8. (We have already shown that this constitutional claim lacks support.) And, though they are less clear on this point, they also appear to say that the Court should refrain from deciding whether disputed subject matter is patentable under §101 until Congress has first resolved that question.

This approach to interpreting §101 is foreclosed by *Diamond* v. *Chakrabarty*, 447 U.S. 303 (1980). There the Court, asked to decide "whether a live, human-made micro-organism is patentable subject matter under 35

U. S. C. §101," *id.* at 305, rejected the argument that "micro-organisms cannot qualify as patentable subject matter until Congress expressly authorizes such protection." *Id.* at 314. It was argued that because "genetic technology was unforeseen when Congress enacted §101 . . . resolution of the patentability of inventions . . . should be left to Congress." *Id.* In reliance on dicta in *Parker* v. *Flook*, 437 U.S. 584, 596 (1978), the Court was urged to "'proceed cautiously when . . . asked to extend patent rights into areas wholly unforeseen by Congress.'" *Chakrabarty*, 447 U.S. at 314–15 (quoting 437 U.S. at 584).

The Court acknowledged that "Congress, not the courts, must define the limits of patentability." *Id.* at 315. However, the Court rejected the inference that courts must await an express finding by Congress that disputed subject matter is patentable. "Congress has performed its constitutional role in defining patentable subject matter in §101; we perform ours in construing the language Congress has employed." *Id.*

At the same time, the Court in *Chakrabarty* explained the scope of its duty when construing §101:

> [O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose. Here, we perceive no ambiguity. The subject-matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting "the Progress of Science and the useful Arts" with all that means for the social and economic benefits envisioned by Jefferson. Broad general language is not necessarily ambiguous when congressional objectives require broad terms.

Id.

The Court emphasized that "*Flook* did not announce a new principle that inventions in areas not contemplated by Congress when the patent laws were enacted are unpatentable *per se*." *Id.* Otherwise, the Court reasoned, such a principle would "frustrate the purposes of the patent law . . . [by] conflict[ing] with the core concept of the patent law that anticipation undermines patentability." *Id.* at 315, 316. Furthermore, requiring Congress to expressly categorize subject matter as patentable *in advance* of its being eligible for patent protection would be not only unnecessary, but impossible. "Congress employed broad general language in drafting §101 precisely because such [pathbreaking] inventions are often unforeseeable." *Id.* at 316 (footnote omitted).

Similar reasoning militates against an argument urged by other *amici*. The American Corn Growers Association and the National Farmers Union argue that "the breadth of section 101 that allowed the bacteria to be patented in *Chakrabarty* is derived from a failure of Congress to specifically reject an extension of such power over the bacteria." Brief for American Corn Growers Association & National Farmers Union as *Amici Curiae* 11. If §101 does not require Congress to expressly categorize subject matter as patentable in order for it to enjoy the protection of patent law, that provision does not extend its reach because Congress omits to bar that extension. *Chakrabarty* teaches that once Congress enacted the broad language of §101, it needed to do nothing more for patent applications based on unforeseeable technologies to be covered as statutory subject matter. Once Congress enacted the broad language of §101, the extension of patentability into fields unknown to the legislative drafters occurs not because Congress omitted to "specifically reject an extension of such power," *id.*, but because Congress adopted language

deliberately chosen to allow for the patentability of the unknown.

IV. CERTAIN OBJECTIONS TO ALLOWING FOR THE PATENTABILITY OF SEXUALLY REPRODUCED PLANTS MAY BE DISMISSED AS IRRELEVANT.

A. Attacks on the Patent System Itself Are Immaterial.

Petitioners' *amici* raise several objections to the patentability of sexually reproduced plants that amount to an attack on the patent system itself. They allege, "Patenting plant varieties hampers innovation as breeders are increasingly unable to use a patented variety for any commercial or research purpose without authorization and a licensing agreement from the patent holder. As the right of plant breeders and companies to exclude others from use of their research expands, all genetic resources are increasingly underutilized." Brief for American Corn Growers Association & National Farmers Union as *Amici Curiae* 16. The *amici* explain why they believe that patent rights "hamper[ ] innovation," *id.*:

> Intellectual property rights restrict the number of suppliers in a market in an attempt to provide incentives for innovation. Contrary to the assertion of the Respondent, there is no evidence that extension of utility patents to plants has actually stimulated invention. Rather, utility patents create incentive to acquire control of basic materials, limit access to them, and seek further patent protection as a means of continuing control.

Id. at 22.

These arguments require only a brief response. They amount to an attack on the legitimacy of intellectual property rights themselves, which are so well-established

by constitutional text, congressional enactments, judicial decisions, and settled practice as to require no defense. More fundamentally, the *amici* argue that experience has demonstrated the folly of "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, §8, cl. 8. Whether they are correct is not a matter to be decided by a court, but by the American people who may (if they wish) abolish it through constitutional amendment. *See id.* at art. V.

B. Allegations of Oppressive Business Practices or Anticompetitive Conduct Are Immaterial.

Petitioners' *amici* allege that granting utility patents for sexually reproduced seed has led to oppressive business practices. The *amici* complain of seed agreements with venue clauses that unfairly favor the patent holder or impose unfair costs on the farmer. Brief for American Corn Growers Association & National Farmers Union as *Amici Curiae* 29. They also complain that the agreements contain "limited warranties that significantly narrow the liability of the patent holder or seed seller for any and all losses, injuries or damages resulting from use or handling of the seed." *Id.*

The *amici* also complain that granting patents for sexually reproduced seed has encouraged anticompetitive conduct. "Prices for seed have risen dramatically since 1985 and the extension of utility patents to sexually reproducing plants have undoubtedly contributed to this increase." *Id.* at 26 (footnote omitted). The *amici* also point to industry consolidation.

> Since the expansion of utility patent protection to sexually reproducing plants, the number of independent seed companies has declined significantly. . . . The result has been an increase in market share for the large seed companies and an increasing involvement by large chemical companies looking for ways to distribute their other products such as herbicides.

Id. at 22.

Neither oppressive business practices or anticompetitive conduct, even if proven, are relevant to the question presented. Patents may be misused. When they are, "patents afford no immunity from the antitrust laws." *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947). But this Court has long observed a sharp distinction between patents and monopolies. *Seymour* v. *Osborne*, 78 U.S. (11 Wall.) 516, 533–34 (1870). More to the point, allegations of anticompetitive conduct are irrelevant because they have nothing to do with the question presented.

C. Allegations That the Patenting System Imposes Undue Burdens on Farmers Are Immaterial.

Petitioners' *amici* charge that giving the developers of sexually reproduced seed intellectual property protection has the result of unduly burdening farmers. "If farmers are not being hauled off their fields and into court, they are spending valuable time reviewing the myriad of licensing and 'technology user' agreements now necessitated by seed companies selling their patented seed." Brief for American Corn Growers Association & National Farmers Union as *Amici Curiae* 29. Somewhat melodramatically the *amici* protest that "Congress never envisioned turning the American farmer into a 'poster child' for patent infringement," *id.* at 30, and that denying patent protection to sexually reproduced plants is necessary for "farmers and plant breeders to remain more than corporate 'serfs' renting the limited available germplasm from a handful of companies." *Id.*

These arguments too are immaterial to the question presented. Congress has not exempted the American farmer, noble as he is, from the patent laws. Whether affirming the status of sexually reproduced seeds as patentable subject matter under 35 U. S. C. §101 will help or injure the American farmer is ultimately a question for the political branches to decide. *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U.S. 17, 28 (1997).

D. Charges of Genetic Erosion Are Immaterial.

Petitioners' *amici* also charge that offering patent protection to sexually reproduced seeds will have dire effects on agriculture. "[C]urrent United States National Seed Storage Laboratory holdings suggest that since 1903 the U.S. has lost 94.1% of beet varieties, 96.1% of sweet corn varieties, 92.8% of lettuce varieties, and 80.6% of tomato varieties." Brief for American Corn Growers Association & National Farmers Union as *Amici Curiae* 14 (footnote omitted). Once again, the *amici* have offered up a red herring. The problem of "maintaining a genetically diverse agriculture," *id.*, is political question that properly belongs with Congress. It is immaterial to the question presented.

CONCLUSION

For the foregoing reasons the judgment of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

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June 15, 2001

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